(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 19 2015 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director in accordance with the following.

The petitioner is a software and computer consulting business. It seeks to employ the beneficiary permanently in the United States as a "Software Developer, Applications." The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition, listing the petitioner's name as [redacted][2] The director concluded that the petitioner had not established that it had the continuing ability to pay the proffered wages of all of its sponsored workers from the instant priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

As set forth in the director's July 17, 2014 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wages of its other sponsored workers as of the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] The name of the petitioner on the Form I-140 is [redacted] We note at the outset that the record establishes that [redacted] is the "doing business as" (DBA) name of [redacted] and the same Federal Employer Identification Number is listed on the Form I-140 and the labor certification.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on March 29, 2013. The proffered wage as stated on the ETA Form 9089 is $75,171.00 per year.

The record indicates that the petitioner is structured as a limited liability company (LLC) and files its tax returns on IRS Form 1065, U.S. Return of Partnership Income.[4] On the petition, the petitioner claimed to have been established in and to currently employ 15 workers. The record before the director closed on July 10, 2014 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's federal income tax return for 2013 was due, but the record only contains the petitioner's 2012 tax return, which indicates that the petitioner's fiscal year is based on a calendar year.[5]

In his decision denying the petition, the director determined that, although the petitioner's 2012 tax return reflects net income greater than the proffered wage of the instant beneficiary, the petitioner had not demonstrated its ability to pay the proffered wages of multiple beneficiaries for which had filed petitions.

On appeal, the petitioner states that there are only three other Form I-140 petitions, besides that of the beneficiary, that have been filed and that remain pending (receipt numbers and). The record contains the 2012 and 2013 Forms W-2 for these three other sponsored workers. United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has filed a Form I-140 petition for at least 17 other sponsored workers, which petitions have been approved and not withdrawn, and these other sponsored workers have not yet adjusted to lawful permanent resident status. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). These petitions were filed under the name

[4] An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

[5] The record contains page one of IRS Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns. It is unclear whether this request for an extension of time was filed and if the IRS granted the petitioner's request. The record does not include evidence of the petitioner's ability to pay the proffered wage as of the March 29, 2013 priority date.

and Consulting. The Forms I-140 relating to these sponsored workers have the following receipt numbers:

Receipt Numbers

Therefore, as the record does not contain the petitioner's 2013 tax return; evidence of wages paid to the other 17 workers with approved Form I-140 petitions; or evidence of the priority date, proffered wage or wages paid to each of these sponsored workers, the matter will be remanded to the director to provide the petitioner an opportunity to address these issues.

Beyond the decision of the director,[6] the record does not establish that the beneficiary meets the experience requirements for the position offered. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

[6] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The labor certification states that the position requires a Master's degree in Computer Science, or in the alternate fields of Computer Applications or Computer Engineering. The labor certification also requires six months of experience in the job offered as a Software Developer or six months of experience as a programmer analyst or data analyst. Part H.14 of the labor certification states that the beneficiary must have the following specific skills:

> Knowledge of ASP.NET, Tomcat, VB.NET, C#.NET, Visual Basic, Visual Studio, FoxPro, ADO, HTML, DHTML, XML, VBScript, VSS, MSSQL Server, Oracle, Crystal Reports, [Data] Reports,[7] ODBC, Web Services and LINQ.JSP, EJB, Servlets, C, Win Forms, Webforms, Oracle SQL Server, AJAX, COM and ADO.

On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

- As a Computer Programmer Analyst for [redacted] beginning on December 1, 2005;
- As a Software Developer for [redacted] from December 10, 2003 until September 20, 2005;
- As a Computer Programmer Analyst for [redacted] from August 16, 1999 until November 30, 2003.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). The record contains an experience letter from [redacted] dated March 10, 2005, stating that the beneficiary has been employed there since December 2003 as a Programmer Analyst. This letter states that the beneficiary's job duties were to "design, develop, and implement quality business software solutions" and noted the beneficiary's specific responsibilities, as follows:

- Interact with end-users, clients and business owners to gather requirements.
- Convert the business needs into technical and functional specification.
- Prepare or recommend necessary hardware/ software resources to implement.
- Design, develop and implement user-friendly applications in Java, HTML, JAVA script, ASP, Oracle 9i and .Net on UNIX and Windows environments.
- Prepare documentation for the technical flow chart, user interfaces and user guide.
- Provide post production support to the end-users for a patch/ bug fix.

The record also contains a letter from [redacted] dated March 3, 2003, stating that the beneficiary has been working there as a Programmer Analyst since August 1999, performing the following tasks:

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[7] Part H.11 of the labor certification also states these skills as part of the job duties of the instant position and, following "Crystal Reports," lists "Data Reports." The word "Data" appears to be inadvertently omitted here.

- [Analyze] user requirements, procedures to automate processing and to improve existing computer systems.
- Prepare flow charts and diagrams to illustrate sequence of steps program, follow and describe logical operations involved.
- Efficient in studies pertaining to development of new information systems to meet current and projected needs.
- Development of web applications.

These experience letters do not demonstrate that the beneficiary gained the specific skills required by Part H.14 of the labor certification. Accordingly, the record does not demonstrate that the beneficiary meets the minimum requirements for the proffered position as set forth on the labor certification.

In addition, the location of the worksite for the position offered is unclear, which calls into question whether a *bona fide* job offer exists. The labor certification states that the primary worksite address is located at The Form I-140, the labor certification, and the Forms W-2 issued to the beneficiary for 2012 and 2013 each state that the beneficiary resides in The labor certification does not state any travel requirements for the position offered or that any work may be performed remotely. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In view of the foregoing, the previous decision of the director will be withdrawn. As the petitioner's 2013 federal tax return was not available when the record closed before the director, the petition will be remanded to the petitioner to request this evidence and consider the petitioner's ability to pay the proffered wages of its other sponsored workers. The petition is also remanded to the director for consideration of whether the beneficiary meets the experience requirements of the labor certification and whether a *bona fide* job offer exists due to the differences between the stipulated work location and the beneficiary's address. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The director's decision of July 17, 2014 is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.